UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DREW MATEYA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:22-cv-01271-RLY-TAB
	)	
COOK GROUP INCORPORATED *et al.*,	)	
	)	
Defendants.	)	

ENTRY GRANTING DEFENDANTS' MOTION TO DISMISS

Plaintiff, Drew Mateya, filed a putative class action against Defendants Cook Group Incorporated and Cook Group Profit Sharing Plan Advisory Committee for violating 29 U.S.C. § 1104(a)(1)(B). Mateya alleges the Advisory Committee selected a service provider—known as a recordkeeper—to help manage the administrative side of its Employee Retirement Income Security Act retirement program, who charged unreasonable administrative fees for its services. Mateya contends Defendants violated their duty of prudence to the Cook Plan beneficiaries under § 1104(a)(1)(B) by selecting and failing to remove the recordkeeper charging the unreasonable fees. Defendants move to dismiss for failure to state a claim. For the reasons discussed below, the court **GRANTS** that motion.

I. Background

The Cook Group Inc. Profit Sharing Plan is a 401(k) defined contribution benefit plan organized under 29 U.S.C. § 2002(2)(A) and § 1002(34). (Filing No. 31-1, Second Am. Compl. ¶ 5 (hereinafter "Compl.")). Cook Group Inc. sponsors the Cook Plan and

has appointed the Advisory Committee to manage it. (*Id.* ¶¶ 26–27). Mateya participates in the Cook Plan. (*Id.* ¶ 20).

The Cook Plan works by allowing participants to place a portion of their salary into the Cook Plan each year, while receiving matching funds from Cook Group, and to invest those funds into a variety of investments selected by Cook and the Advisory Committee. (*See id.* ¶ 31). Contributions by the participant or employer increase the potential retirement income for the participant. (*Id.*). But investing is not free; third parties in the form of market makers and service providers charge fees for investment and plan administration. (*Id.*). When the fees relate to the administration of the plan, they are called recordkeeping and administrative fees. (*Id.* ¶ 6). For ease, the court refers to these fees as "administrative fees" throughout this entry.

The service provider at issue in this case is the "recordkeeper." (*Id.* ¶ 36). The recordkeeper is a third party who offers a variety of administrative services like maintaining records, tracking account balances, overseeing investment selections, processing transactions, providing call center support, and handling other miscellaneous administrative tasks. (*Id.* ¶¶ 42, 44). These services come in two types: bundled and individualized. (*Compare id.* ¶ 42, *with id.* ¶ 44). Fees for bundled services—which include, among other things, accounting and audit services, recordkeeping services, trustee services, stock fund maintenance services, and compliance testing—are generally fixed at a given level of participants. (*Id.* ¶¶ 39, 42). In other words, regardless of how much the participants use the services, the cost to the fund will be constant so long as the fund maintains the same number of participants. (*Id.*). Fees for individualized services—

loan processing, brokerage services, and processing qualified domestic relations orders—vary based on how much the individual participants use the services. (*Id.* ¶ 44). Plans can pick and choose which services they want to provide to their participants, and Mateya alleges all recordkeepers provide the same selection of services. (*Id.* ¶ 48). The Cook Plan pays Fidelity Investments Institutional for bundled and individualized types of recordkeeping services. (*See id.* ¶ 36).

The fees charged by a plan can be paid in two ways. (*Id.* ¶ 69). First, a plan can directly pay the recordkeeper a fee for services. (*Id.*). Second, a plan could indirectly pay for its recordkeeping and administrative services by giving the recordkeeper a cut of the total expense ratio of the mutual funds invested in by the plan. (*Id.*). The Cook Plan pays Fidelity through a combination of direct fees and indirect revenue sharing. (Cook Group Plan 2018 Form 5500 at 22).[1]

[1] A Form 5500 is a document submitted by an ERISA plan to the Department of Labor that details the plan's financial condition, investments, expenses, and operations. These documents are critical to and referenced by the complaint, relied on by Mateya, and are public record documents whose accuracy cannot be questioned. *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012) (court may consider "documents that are critical to the complaint and referred to in it" in deciding a motion to dismiss for failure to state a claim). Accordingly, the court takes judicial notice of all the Form 5500s discussed in this Entry. *Fosnight v. Jones*, 41 F.4th 916, 922 (7th Cir. 2022) ("[J]udges may take judicial notice of matters of public record when ruling on a motion to dismiss."). It is quite ordinary for courts to take judicial notice of an ERISA plan's Form 5500s when considering a motion to dismiss. *See, e.g.*, *Terraza v. Safeway Inc.*, 241 F. Supp. 3d 1057, 1067 (N.D. Cal. 2017) (discussing other cases where courts have taken judicial notices of ERISA plan documents). The Cook Plan's Form 5500s can be found by searching "Cook Group Inc. Profit Sharing Plan" on this Department of Labor website: efast.dol.gov/5500Search/ (last visited May 3, 2023). Form 5500s for comparator plans selected by Mateya are also available on the same website.

II. Legal Standard

In the ERISA context, the Supreme Court has made clear that complaints are evaluated by "applying the pleading standard discussed in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)." *Hughes v. Nw. Univ.*, 142 S. Ct. 737, 742 (2022). Under that standard, the court accepts all non-conclusory facts in the complaint as true and draws all reasonable inferences for the plaintiff. *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007). Further, "courts *must consider* the complaint in its entirety, as well as [some] other sources" such as "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308 (2007) (emphasis added).

A court may only grant a 12(b)(6) motion to dismiss where the complaint lacks "enough facts to state a claim to relief that is plausible on its face" such that the claims have not been "nudged . . . across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Plausibility exists where the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663. The Seventh Circuit also recently clarified the plaintiff must plead facts that overcome any "obvious alternative explanation[s]" for the defendant's conduct. *Hughes v. Nw. Univ.*, 63 F.4th 615, 629 (7th Cir. 2023) ("*Hughes II*"). But "[o]nly *obvious* alternative explanations must be overcome at the pleadings stage, and only by a plausible showing that such alternative explanations may not account for the defendant's conduct." *Id.* (emphasis in original).

III. Discussion

Mateya's claim for imprudently selecting and maintaining an expensive recordkeeper turns on the allegation that the average administrative fee of the Cook Plan was $64 per person, when it should have been around $33 per person had the Cook Plan been administered prudently. (Compl. ¶ 95). He arrives at the average fee of the Cook Plan by averaging the total administrative fees from 2016 to 2022 and dividing that number by the average number of participants over the same period. (Compl. ¶ 92). He then compares that number to the fees of a variety of comparator plans to imply the Cook Plan had unreasonably high administrative fees.

Defendants advance two arguments for why this fails to state a claim. First, they argue Mateya fails to contextualize the amount paid by the comparator plans by failing to describe the services they provided at the amount the comparator plans paid, which is fatal under the operative pleading standard. Second, they point to multiple methodological errors in Mateya's calculation of the plans' fees that prevent him from stating a claim. Mateya rejoins that differences in fees paid by plans are predominantly due to plan size, not services purchased, and that Fidelity previously stated its recordkeeping services were worth between $14 and $21. He also maintains a separate

theory that the Advisory Committee breached its duty of prudence by failing to solicit bids for recordkeeping services.

A. The Advisory Committee's Failure to Remove Fidelity

1. Failure to Plead Services

To raise a plausible inference that a plan's administrator breached its duty of prudence by paying too much for a mix of recordkeeping services, a plaintiff must "identify similar plans offering the *same services* for less." *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 279 (8th Cir. 2022) (citing *Albert v. Oshkosh Corp.*, 47 F.4th 570, 579–80 (7th Cir. 2022)) (emphasis added). Put differently, the plaintiff must allege which services each plan provided and plead facts indicating "fees were excessive relative to the services rendered." *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1169 (6th Cir. 2022) (internal quotation marks omitted) (cited with approval by *Albert*, 47 F.4th at 580). Without alleging the services provided by each plan, a complaint "does not provide the kind of context that could move [the] claim from possibility to plausibility." *Albert*, 47 F.4th at 580.

Mateya did not undertake an analysis of the services each plan provided and only alleged the prices each plan charged to participants. (*See* Compl. ¶ 93). Instead of following *Albert*'s strictures, he alleges all plans purchase recordkeeping services, which makes the plans comparable. (*See, e.g.*, Filing No. 42, Pl.'s Resp. Br. at 6). In making comparisons with other plans, Mateya only provides the following chart at paragraph 93 of his complaint:

Comparable Plans' Total RKA Fees Based on Publicly Available Information from Form 5500

(Price calculations are based on 2018 Form 5500 information or the most recent Form 5500 if 2018 is not available)

Plan	Partici-pants	Assets	Total RKA Fee	Total RKA Fee /pp	Record-keeper	Graph Color
The Boston Consulting Group, Inc. Employees' Savings Plan and Profit Sharing Retirement Fund	8,067	$894,454,060	$336,660	$42	Vanguard	White
Bausch Health Companies Inc. Retirement Savings Plan	8,902	$904,717,349	$322,496	$36	Fidelity	White
Children's Medical Center of Dallas Employee Savings Plan 403(B)	9,356	$349,335,673	$337,416	$36	Fidelity	White
Ralph Lauren Corporation 401(K) Plan	9,389	$552,586,935	$290,066	$31	T. Rowe Price	White
Vibra Healthcare Retirement Plan	9,750	$107,652,510	$277,532	$28	Great-West	White
Republic National 401(K) Plan	9,922	$671,989,837	$324,171	$33	Great-West	White
Southern California Permanente Medical Group Tax Savings Retirement Plan	10,770	$773,795,904	$333,038	$31	Vanguard	White
Cook Plan Average Fee	**11,131**	**$976,162,474**	**$709,074**	**$64**	**Fidelity**	**Red**
Viacom 401(K) Plan	12,196	$1,249,874,734	$376,314	$31	Great-West	White
Sutter Health Retirement Income Plan	13,248	$406,000,195	$460,727	$35	Fidelity	White
Fortive Retirement Savings Plan	13,502	$1,297,404,611	$472,673	$35	Fidelity	White
Michelin Retirement Account Plan	13,798	$616,026,001	$425,270	$31	Vanguard	White

This is insufficient to state a claim. *See Probst v. Eli Lilly & Co.*, No. 1:22-cv-1106, 2023 WL 1782611, at *10 (S.D. Ind. Feb. 3, 2023) (Magnus-Stinson, J.) (explaining nearly identical allegations "do nothing to identify what specific types of services comparator plans received relative to the Plan"); *Laabs v. Faith Techs., Inc.*, No.

20-CV-1534, 2022 WL 17418358, at *3 (E.D. Wis. Nov. 9, 2022) (same); *Singh v. Deloitte LLP*, No. 21-cv-8458, 2023 WL 186679, at *5 (S.D.N.Y Jan. 13, 2023) (same). Mateya suggests he alleged additional facts through online articles to support his assertion that all plans purchased the same recordkeeping services, but his allegations do not support that point. The articles he cites aver "virtually every major recordkeeper provide[s] the same core service[s]." (Compl. ¶ 56). But the services a recordkeeper provides and the services a plan purchases are different: all mechanics might provide emissions checks, tire rotations, and oil changes, but a given customer might only purchase a tire rotation while another purchases all three for more. In short, alleging every recordkeeper in the national market provides the same services and that the Cook Plan is more expensive than other plans is not sufficient to state a claim that the Cook Plan paid an unreasonable amount for the services it received. *See Probst*, 2023 WL 1782611 at *10.

This accords with the Seventh Circuit's decision in *Albert*, where the Seventh Circuit dismissed an excessive administrative fees claim because the plaintiff did not allege facts regarding the quality or type of recordkeeping services provided by the defendant plan and the comparator plans. *Compare Albert*, 47 F.4th at 580 (affirming dismissal even though Plaintiff conclusory alleged fees were excessive relative to services rendered because the complaint did "not provide the kind of context that could move th[e] claim from possibility to plausibility"), *with* (*Albert v. Oshkosh*, No. 1:20-cv-901-WCG (E.D. Wis.), Filing No. 20, Am. Compl. ¶ 215 (alleging that "the services provided . . . did not warrant the fees charged")). That court noted that because "the

cheapest investment option is not necessarily the one a prudent fiduciary would select," simply comparing prices between plans without including allegations regarding the quality and type of services purchased by the plans was insufficient to state a claim. *Albert* 47 F.4th at 579.

Out of circuit courts have routinely rejected allegations that only compare prices, without a description of the services provided, as insufficient to state a claim. *Young v. GM Inv. Mgmt. Corp.*, 325 F. App'x 31, 33 (2d Cir. 2009) (explaining "plaintiffs did not plausibly allege that the fiduciaries agreed to pay excessive fees where they failed to allege that the fees were excessive relative to the services rendered") (cleaned up); *Goldenberg v. Indel, Inc.*, 741 F. Supp. 2d 618, 631 (D.N.J. 2010) (dismissing excessive fees claim because "the [c]ourt ha[d] no way to gauge the reasonableness of the fee without knowing the cost of providers of the same service" and requiring Plaintiff to allege "that similar services could be performed at substantially lower fees"); *Riley v. Olin Corp.*, No. 4:21-cv-1328-SRC, 2022 WL 2208953, at *4 (E.D. Mo. June 21, 2022) ("[P]laintiff must plead that the administrative fees are excessive in relation to the specific services the recordkeeper providers to the specific plan at issue.") (internal quotation marks omitted); *White v. Chevron Corp.*, No. 16-CV-793-PJH, 2016 WL 4502808, at 14 (N.D. Cal. Aug. 29, 2016) (dismissing complaint because plaintiffs did not "allege any facts from which one could infer that the same services were available for less on the market"); *Perkins v. United Surgical Partners Int'l Inc.*, No. 3:21-cv-973, 2022 WL 824839, at *6 (N.D. Tex. Mar. 18, 2022) (same); *Mator v. Wesco Distrib., Inc.*, No/ 2:21-CV-403-MJH, 2022 WL 3566108, at *7 (W.D. Pa. Aug. 18, 2022) (same).

Mateya relies heavily on *Coyer v. Univar Solutions USA Inc.* for the proposition that plaintiffs "do not need to provide examples of similar plans receiving the same services in the same year" because the plaintiff only needs to allege "other similarly-sized plans were receiving at least the same services for less." No. 1:22 CV 0362, 2022 WL 4534791, at *5 (N.D. Ill. Sept. 28, 2022) (emphasis omitted). *But see Probst*, 2023 WL 1782611, at *12 (S.D. Ind.) (rejecting *Coyer* as unpersuasive on allegations essentially identical to the ones here). This court does not find *Coyer*'s analysis persuasive as applied to these allegations. *Albert* specifically requires the complaint plead facts indicating "fees were excessive relative to the services rendered," which means plaintiffs must allege the services received by their plan and others. *Albert*, 47 F.4th at 580.

Further, Mateya stretches the language that he only needs to allege other plans "were receiving at least the same services for less" too far. *Coyer*, 2022 WL 4534791, at *5 (emphasis omitted). That principle only provides a reasonable inference that the fees were unreasonable if the services being compared are substantially similar. *Matousek*, 51 F.4th at 279 (noting "[f]or a benchmark to be 'sound' and 'meaningful,'" it must compare fees for the same services). Zooming the analysis out to compare all plans' administrative fees irrespective of the fact that "recordkeeping" means different things to different plans generalizes the analysis too much to allow the court to draw a plausible inference of unlawful conduct. While recordkeepers may *offer* the same services to all plans, that does not mean every plan *purchases* those services. (*See* Compl. ¶¶ 55–56 (arguing "every major recordkeeper provide [sic] the same core services"); *see also Singh*, 2023 WL 186679 at *5 (explaining "the allegation that all recordkeepers offer the same range

of services does not mean that all plans employing a particular recordkeeper receive an identical subset of services within that range").

This obvious alternative explanation—the Cook Plan and its comparators paid different amounts because they purchased different services—is borne out by the plans' Form 5500s.[2] For example, the Cook Plan paid out $332,709 in total direct administrative expenses for 11,136 participants in 2018, which averages to approximately $30 per person. (Cook Group 2018 Form 5500 at 22 Section i(5)); *see also Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 484 n.3 (8th Cir. 2020) (explaining courts should consider Form 5500s on a motion to dismiss because they are "embraced by the pleadings"). Cook identified these costs as going toward investment advisory, participant loan processing, sub-transfer agency fees, recordkeeping fees, and account maintenance fees.[3] (*Id.* at 10). One comparator, the Sutter Health Retirement Income Plan, paid $460,727 in recordkeeping and administrative fees for 13,248 participants in 2018, which averages around $35 per person. (Filing No. 39-3, Sutter Health 2018 Form 5500 at 3, 7). Sutter Health identified these fees as being for sub-transfer agency fees, recordkeeping fees, and account maintenance fees. *Id.* at 7. And these fees were

[2] Mateya argues he need not plead the services purchased by the Cook Plan because he lacks that information at this stage. Not so. Department of Labor regulations require that participants like Mateya receive disclosures of the fees and expenses charged to them, which means the Cook Plan provided this information to him. *See* 29 CFR 2550.404a-5(c)(2). Further, the Form 5500s are public record and easily searchable through the Department of Labor's Form 5500 database. *See* efast.dol.gov/5500Search/ (last visited May 3, 2023).

[3] Plans use service codes on the Form 5500 to identify what services they are paying for. Each code corresponds with a different service provided by the recordkeeper. While these codes are not an exact science, courts regularly consider service codes to determine what services a plan is providing. *Probst*, 2023 WL 1782661, at *11; *Matousek*, 51 F.4th at 279.

classified as "other" administrative expenses and not "[i]nvestment advisory and management fees." *Id.* at 16.

Note first that the Cook Plan paid less per person in recordkeeping and administrative fees than Sutter Health. But more importantly, Cook had a significant amount of investment advisory and management fees where Sutter Health had none, and Sutter Health paid significantly more in administrative fees.

A survey of the rest of the Form 5500s confirms the comparator plans paid for different services. In 2018, the Cook Plan paid for investment advisory services, participant loan processing, sub-transfer agency services, recordkeeping services, and account maintenance services. (Cook Group Plan 2018 Form 5500 at 10). The Boston Consulting Group paid for computing, tabulating, and data processing services, directed trustee services, participant loan processing, and investment management services. (Filing No. 39-2, Boston Consulting Group 2018 Form 5500 at 7). Another comparator, Ralph Lauren, paid for legal services and trustee services but not sub-transfer agency services. (Filing No. 39-5, Ralph Lauren 2018 Form 5500 at 7–8). Without belaboring the point, this disparity applies across all of the comparators, and none are a similar size[4] and provide the same combination of services to its participants as the Cook Plan, which prohibits them from being comparators. *See Probst*, 2023 WL 12782611, at *11 (dismissing excessive fees claims because "[n]one of the Form 5500s for the 13 comparator plans reflect this combination of services provided by the recordkeeper" and

[4] Not all of the plans are smaller than the Cook Plan, but some are. Mateya alleges the Cook Plan is around 9 times larger than the smallest comparator by assets under management.

because there were substantial disparities in plan sizes"). Ultimately, these plans purchased different mixes of services that intuitively cost different amounts. *See Iqbal*, 556 U.S. at 679 (explaining "[d]etermining whether a complaint states a plausible claim . . . requires the reviewing court to draw on its judicial experience and common sense"); *see also Hughes II*, 63 F.4th at 630 (explaining a court "should not hesitate to dismiss an ERISA claim for breach of the duty of prudence" where a complaint fails to plead facts overcoming an obvious alternative explanation).

Mateya also argues that the differences in administrative fees per participant are driven by size, with smaller plans having less bargaining power than larger plans, but this is contradicted by the Complaint. By Plaintiff's estimation, the cheapest plan, the Vibra Healthcare Retirement Plan, is in the middle in terms of size. (Compl. ¶ 93). Similarly, the second and third largest plans are both $4 per person more expensive than smaller plans like the Viacom 401(k) plan, the Southern California Permanente Medical Group Tax Savings Retirement Plan, and the Ralph Lauren Corporation 401(k) plan. (*Id.*). Those same large plans are also only a nominal amount—$1 per person—cheaper than the second and third smallest plans. (*Id.*) This means there is no observable trend from the information pled that larger plans pay less in recordkeeping and administrative fees than smaller plans. Nor does there seem to be any correlation between the asset size of a plan and its recordkeeping and administrative fees. (*See* Compl. ¶ 93 (alleging the cheapest plan was approximately eight times smaller by assets than the most expensive plan)).

In a final move, Mateya points to a stipulation Fidelity made during litigation in Massachusetts. *See Moitoso v. FMR LLC*, 451 F. Supp. 3d 189, 214 (D. Mass 2020). There, Fidelity explained that it valued its administrative services at between $14–$21 per participant and provided these services to itself at that rate. (*See id.* 1:18-cv-12122-WGY, Filing No. 138-67, Stipulation of Facts at 4–5). It further explained that had Fidelity been a third party, it could have received these same rates, which Mateya suggests indicates the Cook Plan pays too much for administrative services. (*Id.*).

This is unpersuasive. First, that stipulation does not explain which recordkeeping services could be purchased at between $14–$21, nor does this clarify which services the Cook Plan purchased. Second, Fidelity later explained the *Moitoso* stipulation "certainly does not reflect the value of the recordkeeping services that Fidelity provides to *different plans* pursuant to *different recordkeeping contracts for a different set of services*." (*Harmon v. Shell Oil Co.*, No. 3:20-cv-21 (S.D. Tex. Mar. 1, 2021), Filing No. 134, Resp. to Shell Defs.' Additional Notice of Supp. Authority at 3 (explaining Fidelity entered into that stipulation "for the limited purpose of resolving a discovery dispute") (emphasis in original); *see also Moitoso*, Stipulation of Fact ("[T]he parties agree that the stipulations set forth below are offered for the purposes of the [*Moitoso*] litigation only.")).

Moreover, other district courts have rejected the stipulation as creating a meaningful benchmark. *Fritton v. Taylor Corp.*, No. 22-cv-415-ECT-TNL, 2022 WL 17584416, at *8 (D. Minn. Dec. 12, 2022) (denying usage of *Moitoso* stipulation and dismissing complaint as the complaint "lack[ed] allegations" explaining why "Fidelity's stipulated fee range—in view of whatever circumstances prompted the stipulation—make

that range a meaningful benchmark"); *Wehner v. Genentech, Inc.*, No. 20-cv-6894-WHO, 2021 WL 507599, at *6 (N.D. Cal. Feb. 9, 2021) (noting the *Moitoso* stipulation "cannot serve as an adequate market comparator" and dismissing similar claims).

The Seventh Circuit's recent opinion in *Hughes II* does not change the conclusion that Mateya fails to state a claim here. There, the Seventh Circuit reversed the dismissal of an excessive recordkeeping fee claim because the complaint had pled numerous facts demonstrating the administrative fees were excessive. 63 F.4th at 633. Not only did plaintiffs specifically allege facts supporting that "the fees were excessive relative to the recordkeeping services rendered," but they also alleged the key problem was that defendant's plan paid two recordkeepers to do work that could have been more efficiently done by one. *Id.* at 632. And supporting those conclusions were examples of several other plans that had reduced their recordkeeping fees by aggressively negotiating with their recordkeeper and consolidating from multiple recordkeepers to one. *Id.* The plaintiffs also alleged defendant had lowered its plan's recordkeeping and administrative fees following a restructuring, which suggested to the Seventh Circuit "that [defendant's] recordkeeping fees were unreasonably high." *Id.* It was "*all* th[ose] factual averments" that led the Seventh Circuit "to conclude that plaintiffs have plausibly alleged" those defendants incurred unreasonable recordkeeping fees. *Id.* (emphasis added).

Mateya makes none of those factual averments. The "plaintiff must provide enough facts to show that a prudent alternative action was plausibly available" to defendants. *Hughes II*, 63 F.4th at 630. Yet Mateya does not allege facts plausibly suggesting a different recordkeeper could provide the same mix of services purchased by

the Cook Plan for less. In that way, Plaintiff's Complaint is more like *Albert* than *Hughes II*, which necessitates dismissal.

2. Methodological Errors

But even had Mateya met the pleading standard laid out in *Albert*, three methodological errors prevent him from stating a claim. First, he inconsistently counts money paid toward secondary recordkeepers as part of the total recordkeeping fee paid by a plan. Second, he inconsistently adds indirect compensation to his calculations. Third, he compares the Cook Plan's average cost over seven years against the single year cost of the comparators. These errors prevent any like-for-like comparisons between the different plans, which fatally undermines any inference that Fidelity's fees were unreasonable. *See Fritton*, 2022 WL 17584416 (dismissing similar claims on 12(b)(6) and using Form 5500s "because the math Plaintiff[] used to calculate the [Plan's] annual per-participant recordkeeping fee differs so fundamentally from the math Plaintiff[] used to calculate these other plans' . . . per-participant recordkeeping fees").

The first two methodological errors—inconsistently counting fees to secondary recordkeepers and inconsistently adding indirect expenses—are revealed through the same allegations: Mateya pled numbers for administrative expenses that do not match the expenses reported by the Plans in their Form 5500s. For example, Mateya alleges the Cook Plan paid out $755,669 in administrative costs in 2018, where the Cook Plan's Form 5500 reports its administrative costs as $397,709. (*Compare* Compl. ¶ 92, *with* Cook Plan 2018 Form 5500 at 33). This issue applies to the comparator plans too, like the Viacom 401(k) plan, where Mateya underreports that plan's administrative expenses

by about $2.2 million. (*Compare* Compl. ¶ 93, *with* Viacom 401(k) Plan 2018 Form 5500 at 17 Section i(5)). The problem here is not one of accuracy—it does not matter for the purposes of this motion that Mateya's numbers disagree with those in the Form 5500s—but one of comparability—it matters that the Cook Plan's numbers are increased over its Form 5500 value by adding in some costs and other plan's numbers are decreased by removing those same costs.

There are a few things going on. First, Mateya includes payments made to "Strategic Advisors, Inc." for the Cook Plan, but excludes payments made to "Strategic Advisors, Inc.," and other secondary recordkeepers, for other plans. So in 2018, the Cook Plan paid money to Fidelity Investments Institutional and Strategic Advisors, Inc., which are added together to arrive at its total fee. (Cook Plan 2018 Form 5500 at 33 (listing value of administrative expenses as combined total of payments made to Strategic Investors and Fidelity); *see also* Compl. ¶ 92 n.1 (explaining Mateya used this number from the Form 5500)). But in calculating other plans' expenses, like the Fortive Plan, Mateya only counted money paid to Fidelity and excluded money paid to Strategic Advisors, Inc., as well as other secondary recordkeepers like RV Kuhns & Associates, and Seyfarth Shaw. (*Compare* Fortive Plan 2018 Form 5500 at 6–7, *with* Compl. ¶ 93 (using number that matches only one of the Fortive Plan's reported expenses)).

Second, Mateya only occasionally calculates and includes the indirect fees paid by the plans. He avers he calculated the indirect fees paid by the Cook Plan and added that sum to the direct compensation paid by the Cook Plan to arrive at its total fee. (*See* Filing No. 42, Pl.'s Br. in Resp. at 20). But both the Sutter Health Retirement Income

Plan and the Republic National 401(k) Plan report they paid their recordkeeper indirect fees, yet Mateya uses only direct fees to calculate those plans' expenses. (Sutter Health 2018 Form 5500 at 7 (checking a box marked "Yes" in response to the question "Did service provider receive indirect compensation?"); Republic National 2018 Form 5500 at 7 (same)).

These errors stack too: for the Republic National Plan, Mateya did not count fees paid to secondary recordkeepers and excluded indirect compensation from his calculation, while he included fees paid to secondary recordkeepers and included indirect compensation for the Cook Plan. Without consistently determining which fees paid by different plans count, the various plans cannot be compared in a way that states a plausible claim. *See Cunningham v. USI Ins. Servs., LLC*, No. 21 Civ. 1819, 2022 WL 889164, at *5 (S.D.N.Y. Mar. 25, 2022) (dismissing similar claims on 12(b)(6) grounds "because there is no indication of how [Plaintiff] calculated the per-participant fees for recordkeeping and administrative costs for the Plan and each of the comparable retirement savings plans") (internal quotation marks omitted); *Wehner*, 2021 WL 507599, at *6 (dismissing because there was no indication of how plaintiff "calculated the per-participant fees for recordkeeping and administrative costs" among other reasons).

Third, Mateya compares the Cook Plan's average cost over seven years against the single year cost of the comparators. But prices change year-to-year, so costs in one year are not necessarily comparable to costs in another, much less to costs averaged over multiple years. *See Hughes II*, 63 F.4th at 633 (explaining a complaint must be viewed through a context-specific lens); *see also Gonzalez v. Northwell Health, Inc.*, No. 20-cv-

3256, 2022 WL 4639673, at *12 (E.D.N.Y. Sept. 30, 2022) (dismissing excessive recordkeeping claim because unlike other cases the plaintiff did not provide "context-specific" allegations "going beyond a simple comparison of a plan's recordkeeping fees with an ambiguous average-fee amount"). Thus, while a comparator plan's 2018 administrative expenses may provide valuable information for whether the Cook Plan's 2018 expenses were unreasonable, it says nothing about whether the Cook Plan's 2016–2017 and 2019–2021 expenses were unreasonable.

At bottom, the problem with Mateya's complaint is that it attempts to compare numbers that mean different things. To state a claim, Mateya needs to compare, within a given year, direct fees to direct fees, indirect fees to indirect fees, or a combination of direct and indirect fees to a combination of direct and indirect fees. Comparing the direct and indirect fees of the Cook Plan over multiple years to just a single year of direct fees from other plans will not suffice. *See Matousek*, 51 F.4th at 279 (explaining "the key to stating a plausible excessive-fees claim is to make a like-for-like comparison" and affirming dismissal because comparators were not comparable); *Wehner*, 2021 WL 507599, at *1 ("Imprudence cannot be reasonably inferred from [plaintiff's] apples-to-oranges comparisons regarding the Plan's fees and funds."); *Garnick v. Wake Forest Univ. Baptist Med. Center*, No. 1:21-cv-454, 2022 WL 4368188, at *6–7 (M.D.N.C. Sept. 21, 2022) (agreeing that "comparing fees paid to the Plan's recordkeeper to only direct fees paid to similar plans' recordkeepers[] fail[s] to plausibly allege imprudence" while denying a motion to dismiss on other grounds). Because Mateya did the latter, he

fails to allege any meaningful comparisons that would plausibly indicate the Advisory Committee breached its duty of prudence by failing to remove Fidelity.

B. Solicitation of Bids

Mateya's alternative theory for the Advisory Committee's lack of prudence is that the Advisory Committee did not "regularly solicit quotes and/or competitive bids" from the recordkeeping market to ensure Fidelity's prices were reasonable. (Compl. ¶ 90). According to Mateya, it is a prevailing standard of care among industry experts to solicit competitive bids for administrative services every three to five years. (*Id.* ¶ 80).

But the Seventh Circuit has "rejected the notion that a failure to regularly solicit quotes or competitive bids from service providers breaches the duty of prudence." *Albert*, 47 F.4th at 579 (affirming dismissal on 12(b)(6)) (citing *Divane v. Nw. Univ.*, 953 F.3d 980 (7th Cir. 2020) *vacated and remanded on other grounds sub nom. Hughes v. Nw. Univ.*, 142 S. Ct. 737); *see also Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) (affirming grant of summary judgment because "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)"); *Hughes II*, 63 F.4th at 632 ("We reaffirm that a fiduciary need not constantly solicit quotes for recordkeeping to comply with his duty of prudence with respect to plan expenses."). In sum, Mateya fails to state a claim that the Advisory Committee breached its duty of prudence under 29 U.S.C. § 1104(a)(1)(B).

C. Cook Group's Failure to Adequately Monitor Fiduciaries

Mateya's monitoring claim—that Cook Group breached its duty to ensure the Advisory Committee met its fiduciary duties by maintaining reasonable administrative

fees—"rise[s] or fall[s]" with his underlying breach of prudence claim. *Albert*, 47 F.4th at 583. Because the court concludes Mateya failed to state a breach of prudence claim, he also failed to state a monitoring claim.

D. Amendment

Federal Rule of Civil Procedure 15 provides that courts "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). District courts "have broad discretion to deny leave to amend where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile." *Arreola v. Godinez*, 546 F.3d 788, 796 (7th Cir. 2008). This means after a party amends as a matter of course, "leave to amend depends on persuading the judge that an amendment would solve outstanding problems without causing undue prejudice to the adversaries." *Bank of Am., N.A. v. Knight*, 725 F.3d 815, 819 (7th Cir. 2013). The court is not convinced of that here.

Mateya has now proffered three complaints, (*see, e.g.*, Filing No. 31, Motion for Leave to Amend at 2 (explaining Plaintiff "has determined to further amend his complaint to meet the pleading standard for his claims")), and has tried 16 different comparators, none of which are meaningful benchmarks for the Cook Plan. This is true despite Mateya receiving recent guidance from the Seventh Circuit in *Albert* and having the benefit of Defendant's prior arguments counseling dismissal. (*See* Filing No. 18 at 9 (making the same arguments that Plaintiff "alleges nothing about the specific services the Cook Plan, or any comparator plan, was receiving")). While there are no hard and fast rules for denying leave to amend, "in court, as in baseball, three strikes and you're out."

Knight, 725 F.3d 815, 819 (7th Cir. 2013) (affirming district court's dismissal with prejudice after Plaintiff had the opportunity to file three complaints); *see also Agnew v. NCAA*, 683 F.3d 328, 347 (7th Cir. 2012) (affirming dismissal with prejudice after the "plaintiffs had three opportunities" to meet the pleading standard).

Moreover, Mateya has not requested further leave to amend as an alternative to dismissal, nor has he attempted to demonstrate how he would cure the deficiencies present in his complaint. *See Haywood v. Massage Envy Franchising, LLC*, 887 F.3d 329, 335 (7th Cir. 2013) ("Nothing in Rule 15, nor in any of our cases, suggests that a district court must give leave to amend a complaint where a party does not request it."); *see also Gonzalez-Koeneke v. West*, 791 F.3d 801, 808 (7th Cir. 2015) (explaining district courts may dismiss with prejudice "when the plaintiff fails to demonstrate how amendment would cure the deficiencies in the prior complaint."). Accordingly, the dismissal of his claims will be with prejudice.

IV. Conclusion

For the reasons discussed above, the court **GRANTS** Defendants' Motion to Dismiss for Failure to State a Claim (Filing No. 38). As such, the case is **DISMISSED with prejudice**. Defendants' Motion for Oral Argument (Filing No. 44) is **DENIED as moot**. Final judgment shall follow by separate order.

IT IS SO ORDERED this 16th day of June 2023.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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